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May 15, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing
Date of Filing: November 21, 2007
Case Number: TSO-0568

This Decision concerns the eligibility of xxx xxxxx (hereinafter referred to as "the Individual") to hold an access authorization under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the Individual's access authorization should not be restored.

I. FINDINGS OF FACT

On February 6, 2002, the Individual executed a Questionnaire for National Security Positions form (QNSP) and submitted it to a DOE Local Security Office (LSO).¹ In this QNSP, the Individual responded "yes" to Question 24(a) which asked, in pertinent part: "Have you *illegally* used any controlled substance, for example, marijuana, . . . hallucinogenics (LSD, PCP, etc.). . . ?" Exhibit 15 at 8 (emphasis in the original). Individuals who answer "yes" to Question 24(a) are required to list each illegal drug that they have used in the past seven years, the number of times they used the illegal drug, and the time period in which the illegal drug use occurred. The Individual indicated that he used LSD twice, and marijuana 30 times, between August 1996 and May 1997. *Id.* The Individual made no mention of hallucinogenic mushroom consumption in his drug use listing.

On June 5, 2002, the LSO conducted a Personnel Security Interview (the 2002 PSI) with the Individual and questioned him extensively about his illegal drug use.² Exhibit 17 at 26-33. The Individual essentially reiterated the information he had provided in the QNSP.

¹ The QNSP appears in the record as Exhibit 15.

² The transcript of the June 5, 2002, PSI appears in the record as Exhibit 17.

On October 28, 2002, the Individual was interviewed by an Investigator for the Office of Personnel Management (OPM).³ During this interview, the Individual confirmed the accuracy of the information he had provided in the QNSP and 2002 PSI. On June 19, 2002, the Individual signed a DOE Drug Certification and the DOE granted him an “L” security clearance. Exhibit 16 at 28. The Individual’s “L” clearance was upgraded to a “Q” clearance on December 2, 2002. Exhibit 2 at 3.

On February 13, 2007, the Individual sent a memorandum to the LSO.⁴ That memorandum states, in pertinent part:

The purpose of this memo is to be forthright and honest in adherence to the reporting requirements set forth by [the Individual’s employer] and the Department of Energy.

I’ve been employed at [a DOE facility] for the past 5yrs and am approaching the 5yr re-investigation for renewal of my Q clearance as I was thinking about the clearance process and considering what things I needed to get together, it occurred to me that during my previous investigation I failed to disclose accurately the dates for which I used illegal drugs, specifically marijuana. In addition to the 8/1996-5/1997 dates that I did admit to, I failed to indicate that I occasionally used marijuana, during my undergraduate studies, between the dates of 9/2000-9/2001. The reason I failed to include all the dates on the application was because I didn’t believe it was relevant. I thought “I’ve included the fact that I’ve used drugs and been specific about which ones, how important are the dates; after all I don’t use drugs now and don’t intend to use them in the future, regardless if I have a clearance or not.” In short I didn’t take the clearance process serious enough. I’m sorry for this and I was sorely wrong about the seriousness of the clearance process. . . .

The primary reason I am disclosing this information now is because I don’t want to deceive or discredit either the processes or people associated with obtaining and maintaining a clearance and because I don’t want a discrepancy between previous and future clearance application(s) without appropriate and formal explanation.

Exhibit 11 at 2. This memorandum prompted the LSO to conduct a PSI of the Individual on March 21, 2007 (the 2007 PSI).⁵ During this PSI, the Individual was asked about his history of illegal drug use. For the first time, the Individual admitted in the 2007 PSI that he had used hallucinogenic mushrooms once or twice. Exhibit 16 at 7, 9-13, 17-19. The Individual further

³ The OPM Investigator’s report of this interview appears in the record as pages 21-23 of Exhibit 18.

⁴ The Memorandum appears in the record as Exhibit 11.

⁵ The transcript of the March 21, 2007, PSI appears in the record as Exhibit 16.

admitted in the 2007 PSI that he had not disclosed his hallucinogenic mushroom use in the 2002 PSI. *Id.* at 9. During the 2007 PSI, the Individual revealed for the first time that he had used marijuana an estimated 20 to 25 times during the period beginning in September 2000 and ending in September 2001. Exhibit 16 at 15.

When asked if he thought he could “be blackmailed or coerced regarding [his] use [or] involvement with illegal drugs,” the Individual responded, “No, I think that’s actually the reason why I reported this, because I did actually feel like I was somewhat vulnerable because I hadn’t reported it.” *Id.* at 20. The Individual asserted that he had provided inaccurate information in the past because “I don’t really think I really understood the gravity of anything that I was getting into.” *Id.* at 22. The Individual further noted that, when he was first investigated in 2002, he felt the security clearance process was “an encroachment” and “a litmus test on my character.” *Id.* at 26-27.

On the basis of the foregoing, the LSO concluded that the Individual had used marijuana, LSD and hallucinogenic mushrooms, and then provided false information concerning his drug use to the LSO during the June 5, 2002, PSI, in his interview with the OPM investigator, and in the QNSP. The LSO initiated an administrative review proceeding by issuing a letter notifying the Individual that it possessed information that raised a substantial doubt concerning his eligibility for access authorization (the Notification Letter). *See* 10 C.F.R. § 710.9. The Notification Letter specifies three types of derogatory information which fall within 10 C.F.R. § 710.8(f), (k) and (l).⁶

The Individual filed a Request for a Hearing with the LSO. The LSO forwarded the Request for Hearing to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as Hearing Officer. At the hearing, the LSO presented no witnesses. The Individual presented four witnesses and testified on his own behalf. *See* Transcript of Hearing, Case No. TSO-0568 (hereinafter cited as “Tr.”). The LSO submitted 18 exhibits, marked as Exhibits 1 through 18, while the Individual did not submit any exhibits.

II. STANDARD OF REVIEW

The Hearing Officer's role in this proceeding is to evaluate the evidence presented by the agency and the Individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a).

⁶ The Notification Letter alleges that the Individual has “[t]rafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, . . . etc.). . . .” 10 C.F.R. § 710.8(k). The Notification Letter also alleges that the Individual has “deliberately misrepresented, falsified, or omitted significant information from . . . a Questionnaire for Sensitive (or National Security) Positions, . . . [or] a personnel security interview, . . . in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization, or proceedings conducted pursuant to § 710.20 through § 710.31.” 10 C.F.R. § 710.8(f). The Notification Letter further alleges that the Individual has “[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security.” 10 C.F.R. Section 710.8(l).

The regulations state that “[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.7(a). I have considered the following factors in rendering this opinion: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, including knowledgeable participation; the frequency and recency of the conduct; the Individual's age and maturity at the time of the conduct; the voluntariness of the Individual's participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

III. ANALYSIS

Criterion K

The evidence supporting the LSO's allegation that the Individual violated Criterion K is the Individual's admission that he used marijuana, LSD and hallucinogenic mushrooms during two time periods, August 1996 to May 1997, and September 2000 to September 2001.

The use of illegal drugs, such as marijuana, LSD or hallucinogenic mushrooms raise questions about an individual's reliability and trustworthiness, both because they may impair judgment and because illegal drug use raises questions about a person's ability or willingness to comply with laws, rules and regulations. *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information issued by the Assistant to the President for National Security Affairs, The White House (December 29, 2005) (Adjudicative Guidelines) at 11 (Guideline H).* “Moreover, the use of illegal drugs (and the disregard for law and authority that such use suggests) indicates a serious lapse in judgment and maturity. Involvement with illegal drugs may also render the user susceptible to blackmail or coercion.” *Personnel Security Hearing, Case No. TSO-0437, 29 DOE ¶ 83,025 at 86,846 (2007).*

A finding of derogatory information does not, however, end the evaluation of evidence concerning the individual's eligibility for access authorization. *See Personnel Security Hearing, Case No. VSO-0244, 27 DOE ¶ 82,797, affirmed (OSA, 1999); Personnel Security Hearing, Case No. VSO-0154, 26 DOE ¶ 82,794 (1997), affirmed, Personnel Security Review, Case No. VSA-0154, 27 DOE ¶ 83,008 affirmed (OSA, 1998).* In the end, like all Hearing Officers, I must exercise my common-sense judgment in determining whether an individual's access authorization should be restored after considering the applicable factors prescribed in 10 C.F.R. § 710.7(c). Therefore, I must consider whether the Individual has submitted sufficient evidence of mitigation to resolve the security concerns raised by his illegal drug use. The Adjudicative Guidelines list the following conditions, both of which are present in the instant case, that could mitigate security concerns raised by illegal drug use:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness or good judgment
- (b) a demonstrated intent not to abuse any drugs in the future, such as:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used;
 - (3) an appropriate period of abstinence;
 - (4) a signed statement of intent with automatic revocation of clearance for any violation.

Guideline H at 12. At the hearing, the Individual testified that he has not used illegal drugs since September 2001. Tr. at 35. This testimony was corroborated by the testimony of the Individual's spouse of ten years and by the testimony of a very close friend of the Individual's (the friend). *Id.* at 9-11, 14, 59, 62. The friend, who remains in weekly contact with the Individual, has known the Individual since third grade and had lived with the Individual for several years. *Id.* at 57-58.

The Individual's spouse testified that the associates who used drugs with the Individual (including herself and the friend) have quit using illegal drugs. *Id.* at 10-11, 15. Moreover, the Individual, his spouse and the friend each testified that the Individual has matured and undergone personal changes that make him unlikely to return to illegal drug use. *Id.* at 11-12, 17-18, 38, 60-61. Since September 2001, the Individual has graduated from college, begun a career with a DOE contractor, entered his thirties and obtained a masters degree. *Id.* at 31-32, 34. The Individual's spouse testified that the Individual was motivated to stop using drugs by a desire to be a better father. *Id.* at 10-11. The Individual also testified to this effect. *Id.* at 38. Finally, I note that the Individual signed a DOE Drug Certification in 2002. Exhibit 16 at 28.

The record convinces me that the Individual's last illegal drug use occurred seven years ago, is unlikely to recur and no longer casts doubt on the individual's current reliability, trustworthiness or good judgment. Moreover, the testimonial evidence convinced me that it is highly unlikely that the Individual will return to illegal drug use in the future. For this reason, I find that the Individual has mitigated the security concerns raised by his illegal drug use under Criterion K.

Criterion F

The Individual forthrightly acknowledges that he deliberately misrepresented the facts concerning his marijuana use in order to give the false impression that his marijuana use had ended in 1997, five years before he submitted the QNSP, when in fact he had used marijuana an estimated 20 to 25 times from September 2000 to September 2001, less than six months prior to the date he submitted the QNSP. Tr. at 40-41, 46-47, 49-50. Moreover, the Individual has admitted that he used hallucinogenic mushrooms once or twice during the period between August 1996 and May 1997. However, the Individual omitted his use of hallucinogenic mushrooms from the QNSP and from the February 13, 2007 memorandum. Accordingly, the LSO properly invoked Criterion F for this allegation.

While the Individual acknowledges his omission of his September 2000 to September 2001 marijuana use from the QNSP, the 2002 OPM Interview and the 2002 PSI was intentional and designed to facilitate his receipt of a DOE security clearance, the Individual asserts that his omission of his hallucinogenic mushroom use from the QNSP was inadvertent. Tr. at 26-28, 42, 48, 50. The Individual did not disclose his hallucinogenic mushroom use during his 2002 OPM interview either. Exhibit 7; Exhibit 18 at 22-23. I find it difficult to believe that the Individual inadvertently omitted his hallucinogenic mushroom use from the QNSP and from the OPM Interview, but then was able to recall his hallucinogenic mushroom use years later during his 2007 PSI. These allegedly inadvertent omissions occurred simultaneously with the admittedly purposeful omissions of the Individual's then recent marijuana use. The Individual also omitted his hallucinogenic mushroom use from the February 13, 2007, memorandum. At the hearing, the Individual asserts that at the time he prepared the February 13, 2007 memorandum, he thought he had previously disclosed his hallucinogenic mushroom use during the 2002 PSI. Tr. at 26-28. However, during the 2007 PSI, the Individual had admitted that he did not disclose his mushroom use during the 2002 PSI. Exhibit 16 at 9. I find the contradictory explanations provided by the Individual for his omission of his hallucinogenic mushroom use from his QNSP and from his February 13, 2007 memorandum to be troubling.

False statements and intentional omissions by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability, and trustworthiness. The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. See e.g., *Personnel Security Hearing (Case No. VSO-0281)*, 27 DOE ¶ 82,821 at 85,915 (1999), *aff'd*, 27 DOE ¶ 83,030 (2000) (terminated by OSA, 2000); *Personnel Security Hearing (Case No. VSO-0013)*, 25 DOE ¶ 82,752 at 85,515 (1995), 25 DOE ¶ 82,752 (1995) *affirmed* (OSA, 1995); Guideline E.

In a number of decisions, DOE Hearing Officers have considered the implications of falsifications. The factors considered in these cases include the following: whether the individual came forward voluntarily to renounce his falsifications, compare *Personnel Security Hearing, Case No. VSO-0037*, 25 DOE ¶ 82,778 (1995), *affirmed* (OSA, 1996) (voluntary disclosure by the individual), with *Personnel Security Hearing, Case No. VSO-0327*, 28 DOE ¶ 83,005 (2000), *affirmed* (OSA 2000) (falsification discovered by DOE security); the length of time the falsehood was maintained; whether a pattern of falsification is evident; and the amount of time that has transpired since the individual's admission. See *Case No. VSO-0327* (less than a year of truthfulness insufficient to overcome long history of misstating professional credentials). See also *Personnel Security Hearing, Case No. VSO-0289*, 27 DOE ¶ 82,823 (1999) (19 months since last falsification not sufficient evidence of reformation from falsifying by denying drug use); *Personnel Security Hearing, Case No. VSO-0319*, 27 DOE ¶ 82,851 (2000), *affirmed* (OSA, 2000).

In other cases, Hearing Officers have stated that a subsequent pattern of responsible behavior is of vital importance to mitigating security concerns arising from irresponsible behavior such as lying. See e.g., *Personnel Security Hearing, Case No. TSO-0394*, 29 DOE ¶ 82, 984 (2006) (six months of honest behavior not sufficient to mitigate dishonesty that spanned for nine months

when Individual's admission of previous dishonesty occurred in response to a DOE Psychiatrist's suggestion that he might have her tested for drug use); *Personnel Security Hearing, Case No. TSO-0316*; (finding that the Individual had failed to establish a pattern of honest behavior); *Personnel Security Hearing, Case No. TSO-0302*, 29 DOE ¶ 82, 968 (2006) (10 months of honest behavior not sufficient to mitigate falsehood that spanned 16 years); *Personnel Security Hearing, Case No. VSO-0555*, (seven months of honest behavior not sufficient to mitigate dishonesty that spanned for six years when disclosure of falsifications was not voluntary); *Personnel Security Hearing, Case No. VSO-0448*, 28 DOE ¶ 82,816 (2001) *affirmed* (OSA, 2001) (11-month period not sufficient to mitigate four-year period of deception); *Personnel Security Hearing, Case No. VSO-0440*, 28 DOE ¶ 82,816 (2001) *affirmed* (OSA, 2001) (18 months of responsible, honest behavior sufficient evidence of reformation from dishonesty that spanned six months in duration), *Personnel Security Hearing, Case No. VSO-0384 (2001)* (six months of honest behavior not sufficient to mitigate dishonesty that spanned for nine months when disclosure of falsifications was not complete); (*Personnel Security Hearing, Case No. VSO-0289*, 27 DOE ¶ 82,823 (1999), *aff'd Personnel Security Review*, 27 DOE ¶ 83,025 (2000) *affirmed* (OSA, 2000) (19-month period not sufficient to mitigate lying on security form after a 12-year period of concealment of violations of the DOE Drug Certification).

Turning to the present case, I find that the Individual has not established a pattern of responsible conduct. Before I could consider whether the Individual has established a pattern of responsible behavior, I would need to be convinced that the Individual has been completely candid with me and the LSO. The inconsistencies in the Individual's explanations of why he omitted his hallucinogenic mushroom use from his QNSP and his February 13, 2007 memorandum raise doubts about the Individual's credibility and reliability, thereby preventing me from finding that he has begun to comport himself in an honest manner.

I reach this conclusion in spite of evidence in the record showing that the Individual has changed and matured. There is ample evidence in the record indicating that the Individual's conscience led him to disclose his marijuana omissions to the LSO. The Individual's spouse testified that the Individual had developed strong religious convictions that led him to disclose his omissions. Tr. at 12, 17-18. The Individual's spouse further testified that then Individual had assumed a leadership role in their spiritual community. *Id.* The friend testified that the Individual had undergone some important changes in life and came to strongly believe in the importance of honesty. *Id.* at 60, 63. The friend further testified that the Individual's religious beliefs had motivated him to come forward with the truth. *Id.* at 61. The friend also testified that the Individual had matured a great deal during the last six or seven years. *Id.* at 61. The Individual's former supervisor testified that he had supervised the Individual for five years. *Id.* at 74. He also testified that he had "seen [the Individual] mature a lot in the last five-and-a-half years that I've known him." *Id.* at 81. The Individual's spouse, his friend, his coworker, and his former supervisor each convincingly testified that the Individual was honest and reliable. *Id.* at 11-12, 60, 67-68, 79-80.

It took courage and character for the Individual to come forward with the derogatory information about himself. Moreover, I find that the Individual regrets his past mistakes and has learned from them. However, since the Individual has provided conflicting explanations of his omission

of his hallucinogenic mushroom use from the QNSP and from the February 13, 2007 memorandum, I am not sufficiently convinced that the Individual is now being honest with the DOE and will remain so in the future.

Accordingly, I find that the Individual has not sufficiently mitigated the security concerns raised under Criterion F.

Criterion L

Specifically, the Notification Letter, quite appropriately, raised many of the same concerns about the Individual under Criterion L that it did under Criterion F. These concerns have been addressed under the forgoing section on Criterion F. The LSO did raise one concern under Criterion L that was not addressed under Criterion F. Specifically, the LSO alleged that the Individual's concealment of the extent of his illegal drug use rendered him susceptible to pressure, coercion, exploitation, or duress.

Clearly, the Individual's concealment of the extent of his illegal drug use did in fact render him susceptible to pressure, coercion, exploitation, or duress. By coming forward with the truth about his illegal drug use, the Individual mitigated this concern. However, the remaining security concerns raised under Criterion L remain unmitigated from the reasons set forth in my discussion of Criterion F.

IV. CONCLUSION

For the reasons set forth above, I conclude that the LSO properly invoked Criteria K, F and L. I found that the Individual has mitigated the security concerns raised under Criterion K. However, I have also found that the Individual has not mitigated those security concerns raised under Criteria F and L. I therefore find that the Individual has not demonstrated that restoring his security clearance would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, it is my opinion that the Individual's access authorization should not be restored. The Individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Steven L. Fine
Hearing Officer
Office of Hearings and Appeals

Date: May 15, 2008